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Fides integra, sana, non vacillans

Mancio de Corpus Christi († 1576) on the (in)compatibility of doubt and good faith

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Abstract

In his lecture notes, the Salamanca scholar Mancio de Corpus Christi († 1576) dealt extensively with the moral-theological question of whether a possessor in doubt as to his entitlement of a possession, lacks the necessary good faith for acquisitive prescription. Mancio discusses, evaluates and compares existing opinions of moral theologians of his time on the matter and expounds on his own teaching. The dialectical discourse reveals that opting for a more or less minimalistic concept of morality is one of the decisive factors.

Resumen

En sus apuntes de clase, el estudioso salmantino Mancio de Corpus Christi († 1576) trató de un modo exhaustivo la cuestión teológico-moral de si el poseedor que duda de su derecho a la posesión, carece de la buena fe necesaria para la prescripción adquisitiva. Mancio analiza, evalúa y compara las opiniones de los teólogos morales de su época a este respecto y expone su propia doctrina. El discurso dialéctico muestra que optar por un concepto de moralidad más o menos minimalista constituye uno de los factores más decisivos.

Keywords

Doubt, good faith, prescription, Mancio, probabilism

Palabras clave

Duda, buena fe, prescripción, Mancio, probabilismo

Summary: 1. Introduction: doubt and good faith. 2. Mancio de Corpus Christi and his approach to the question. 3. Doubt and good faith: three opinions. 3.1 The view of the Ordinary Gloss to the *Liber Extra*. 3.2 The view of Adrian of Utrecht. 3.3 The view of Domingo de Soto. 4. Three ‘notes’. 5. Mancio’s four *conclusions*. 6. Mancio’s response to the arguments of Panormitanus and Adrian. 7. A range of opinions. 8. Mancio’s own position in the debate. 9. To conclude: “*dubium superveniens non nocet*” revisited. Bibliography

In the civilian tradition, good faith is considered a requirement for legitimate possession and acquisition of ownership through prescription. Good faith (*bona fides*) is the belief of being entitled to the thing one possesses. If this possession is acquired on the basis of a contract of sale, it encompasses the belief that the vendor had authority to alienate. Bad faith (*mala fides*) by contrast, is knowing that someone else is entitled to the thing one possesses e.g. because one is aware of the fact that the vendor lacked the necessary authority to alienate. The sources of law qualify the position of the possessor in terms of this dichotomy: i.e. being in good faith or bad faith but it can seriously be questioned whether in the day-to-day reality of legal intercourse, every possessor can be subsumed within the two categories mentioned. In

many cases, evidence may exist which deprives the possessor of the firm belief of being entitled but at the same time does not clearly show that there is someone else who can assert a claim. How should such a doubting possessor be qualified? Is he in good faith or in bad faith? The answer to this question has various legal implications, since in the civilian tradition good faith enables the possessor to enjoy the fruits of his possession; grants him the favourable position of defendant when possession is claimed in court (*Passivlegitimation*); and allows him to acquire ownership through prescription.

Despite the fact that this question has a distinct legal nature, in the two *Corpora* of learned law there are hardly any provisions, dealing with the effects of the possessor's doubt. As will be shown below, in one text from the Digest, D. 41.1.48pr, it is possible to discern the odd clue. However, this could only be achieved through a certain emendation of the wording, since in both Vulgate and critical edition of the Digest, the text deals with a buyer in good faith and rules that the latter will undoubtedly acquire ownership of the fruits: "the possessor in good faith undoubtedly makes the fruits his own".¹ Also, a text in Gratian's Decree, C.34 q.1-2 c.5, derived from Saint Augustine (354-430),² was sometimes used as a starting point for discussing the consequences of doubt, viz. in the sense that doubt does not entail bad faith and, accordingly, good faith continues to be present. The text, however, only refers to good faith and bad faith. It rules that as long as a woman does not know she is married to another woman's husband – and accordingly, in good faith, performs marital duties – she does not commit adultery. This woman is subsequently compared with a possessor in good faith: "as in title to tenements, one is called correctly a possessor in good faith, as long as one does not know one possesses another's plot of land, because if one knows and does not part with the possession to which the other is entitled, then one is said to be in bad faith and one will justly be called to be unjust".³

The sources of Roman law and Canon law do not reveal why the question of being in doubt was not considered. This could have to do with procedural difficulties. If doubt would indeed exclude good faith and, accordingly, would prevent the possessor from acquiring ownership through prescription, it is the entitled one who, being the plaintiff in litigation, carries the burden of proving the existence of the defendant's doubt. However, doubt is not positive knowledge which may easily be established or can be presumed; and doubt, which exists in the possessor's psyche, belongs to the realm of the human mind and is something which the outer world will often fail to comprehend. Good faith is required for acquisitive prescription also in the *forum internum*,⁴ but here the question as to the effects of doubt seems to be more

¹ D. 41.1.48 *Paulus libro septimo ad Plautium* pr. Bonae fidei emptor non dubie percipiendo fructus etiam ex aliena re suos interim facit non tantum eos, qui diligentia et opera eius pervenerunt, sed omnes, quia quod ad fructus attinet, loco domini paene est. denique etiam priusquam percipiat, statim ubi a solo separati sunt, bonae fidei emptoris fiunt. nec interest, ea res, quam bona fide emi, longo tempore capi possit nec ne, veluti si pupilli sit aut vi possessa aut praesidi contra legem repetundarum donata ab eoque abalienata sit bonae fidei emptori.

² Cf. Augustine, *De fide et operibus*, n. 7.

³ C.34 q.1-2 c.5 *Non est adultera uirgo, quae nesciens uiro nubit alieno*. Si uirgo nesciens uiro nupserit alieno, hoc si semper nesciat, numquam ex hoc erit adultera. Si autem sciat, iam ex hoc esse incipit, ex quo cum alieno sciens cubauerit, sicut in iure prediorum tamdiu quisque bonae fidei possessor rectissime dicitur, quamdiu se possidere ignorat alienum; cum uero scierit, nec ab aliena possessione recesserit, tunc malae fidei perhibetur, tunc iuste iniustus uocabitur (...).

⁴ Cf. Hallebeek, J., "Early Modern Scholasticism on acquisitive and extinctive prescription", *Praescriptionibus iura tolluntur* [Comparative studies in continental and Anglo-American legal history] (E.J.H. Schrage e.a. eds.), Berlin, 2018 (forthcoming).

obvious. After all, the possessor himself will be aware of the deep stirrings of his soul and his spiritual counsellor or confessor can take these into account in order to determine the just and appropriate line of action in the specific situation. This difference may explain why the question of the consequences of doubt is scarcely discussed for the *forum externum*, but abundantly for the *forum internum*.

In this contribution, I would like to focus on the moral-theological debate in early modern scholasticism concerning the problem just mentioned *i.e.* the effects of doubt. In so doing, I have taken the most instructive lecture notes of Mancio de Corpus Christi († 1576) as a guideline. These notes record the divergent approaches to the matter which were already in existence by the middle of the sixteenth century. The rendering by Mancio will be compared with the writings of the discussed scholars. This is not always easy and, due to various circumstances, will not always result in a clear and univocal picture. The notes of Mancio do not always contain precise references. The printed writings, as handed down, are not necessarily those consulted by Mancio and may display an earlier or later opinion of the same scholar than that considered in the notes. Moreover, Mancio may have adapted or simplified the various opinions for didactical purposes. We should also realize that we are dealing here with lecture notes, not a text which was edited to be published. On the whole, however, the paraphrases of Mancio can be confirmed by what is recorded in the printed works of the scholars themselves. They produce a reasonably reliable image of the *status questionis* in the middle of the sixteenth century and an excellent survey of the entire range of divergent approaches by the first generations of early modern scholastics, which underpin all later treatises of the subject. Those various approaches are not always simple and obvious. Nonetheless, I will depict these views, as seen through the eyes of Mancio, as faithfully as possible; albeit it in connection with the primary sources and attempt to analyse the way Mancio evaluates and compares these opinions.

The moral-theological perspective implies that a choice has to be made whether to tend towards a more rigoristic or more laxistic attitude. The uncertainty about a factual situation (Am I entitled? Is someone else entitled?) implies also uncertainty as to which line of action is morally correct. When I am the owner of what I possess, I may resign myself to the factual status quo. When I am not entitled to the thing I possess, a different line of action is required. I have to find out the truth or abandon the possession. The one who doubts will face a quandary and has to make a choice. The more rigoristic approach requires to take no risk and act just as a possessor in bad faith would have to. The doubting possessor opts in such a case for moral certainty (tutorism) although that may be disadvantageous to him. A more laxistic attitude, on the contrary, morally approves of any option (and corresponding line of action) as long as it seems probable (probabilism). The doubting possessor should take as starting point a probable premise, not the most probable one. That implies that he may act as if he is entitled, which in many respects can be less disadvantageous. From the more rigoristic perspective, as a matter of fact, the latter carries a considerable moral risk. Below it will become clear whether the scholars, scrutinized by Mancio, revealed a minimalistic or less minimalistic concept of morality.⁵

Mancio discusses the question of the doubting possessor for the *forum internum*, as did the late medieval manuals for confessors, and yet his treatment of the subject is relevant for the

⁵ For the minimalistic concept of morality in early modern scholasticism see Decock, W., *Theologians and contract law, The moral transformation of the ius commune (ca. 1500-1650)*, Leiden & Boston, 2013, pp. 73-82.

history of law and history of legal thought. The problem discussed is imbedded in legal practice. It concerns a quandary which can arise in day-to-day business traffic. Moreover, as will be shown, the dialectical approach of early modern moral theology is by no means reluctant to adduce arguments derived from the sources of law. Furthermore, a comparison between the two *fora* continuously urges itself upon the reader. Moral-theological thinking and legal thinking are never kept strictly separate.

2. Mancio de Corpus Christi and his approach to the question

The first moral-theological works, which granted a fully-fledged position to the question of the doubting possessor, date back to the middle of the sixteenth century. It was discussed, for example, in the *Codex de restitutione et contractibus* of Juan de Medina (1489-1545) who taught at Alcalá de Henares. This work was published posthumously in 1546.⁶ Less known is the treatment of the question in the notes of Mancio, who taught at Salamanca. These lecture notes, dating from the years 1565-1566, were edited only in the last century by Augusto Sarmiento (b. 1941, University of Navarra).⁷ The treatments of the question whether doubt affects good faith by Medina and Mancio lay at the root of a continuous tradition in early modern scholasticism of discussing the subject, leading to an extensive and extremely detailed case-based analysis in the seventeenth century. In the *Commentariorum in disputationem de iustitia ... liber primus* of Miguel Bartolomé Salón (1539-1621), first published in 1591, the question already covered fourteen columns in folio.⁸

Mancio, or Mancio de Corpus Christi, was born in Becerril de Campos, probably in 1507. He studied in Salamanca, where he entered the order of the Dominicans. He continued his studies under Francesco de Vitoria (1483-1546) and Domingo de Soto (1494-1560). From 1548 he taught at Alcalá de Henares and from 1564 at Salamanca. He died in Salamanca on the 9th of July 1576.⁹

Mancio starts the discussion concerning the effects of doubt on good faith by stating that the designation ‘good’ in ‘good faith’ requires this faith (*fides*) to be intact (*integra*), sound (*sana*) and stable (*non vacillans*).¹⁰ This lead obviously to the question whether doubt will affect good faith. Mancio presents it as a serious or considerable problem (in Latin *magna quaestio*): may the one who doubts the thing he possesses is his, enjoy the benefit of prescription?¹¹ The treatment has a scholastic structure. First, Mancio describes three

⁶ Joannes Medina, *Tomus secundus in quo de restitutione et contractibus (...) agitur*, ed. Ingolstadt 1581, pp. 116-118 (Quaestio XVII: De fide ad praescribendam necessariam).

⁷ Sarmiento, A., “Textos inéditos de la Escuela de Salamanca (Mancio, De la justicia)”, *Persona y derecho* 10 (1983), pp. 421-468; Sarmiento, A., “Textos inéditos de la Escuela de Salamanca (Mancio, Del dominio)”, *Persona y derecho*, 12 (1985), pp. 243-321. The fragment on prescription by a doubting possessor can be found on pp. 283-289.

⁸ See Michael Bartholomeus Salón, *Commentariorum in disputationem de iustitia quam habet Divus Thomas secunda sectione secundae partis suae Summae Theologicae (...) Liber primus*, ed. Valencia 1591, columns 584-597 (Tractatus de dominio rerum, q. 5, art. 7, An fides dubia sufficiat ad praescribendum).

⁹ Beltrán de Heredia, V., “El maestro Mancio de Corpus Christi O.P.”, *La Ciencia Tomista* 51 (1935), pp. 7-103, reprinted in: *Miscelania Beltrán de Heredia IV*, Salamanca, 1972, pp. 363-446.

¹⁰ Sarmiento 1985, p. 283.

¹¹ Sarmiento 1985, p. 283: Sed hinc nascitur magna quaestio: utrum possessor qui dubitat rem esse suam, gaudeat beneficio praescriptionis.

established opinions, which he eventually rejects. Subsequently, he formulates three notes or observations. In the third place he reveals his own teachings in four conclusions and, finally, he refutes the main arguments, supporting the opinions with which he disagreed.¹²

3. Doubt and good faith: three opinions

We will now first see what the three existing opinions entail which Mancio describes, *i.e.* those of the Ordinary Gloss to the *Liber Extra*; Adrian of Utrecht (1459-1523); and that of Mancio's own master Domingo de Soto. The three have in common, that they answer the question in the affirmative: despite his doubting faith the possessor will acquire ownership through prescription. There are, however, mutual differences. While the Gloss was primarily pronouncing upon the Canon law of the *forum externum*, Adrian and Soto pronounced upon the *forum internum*. Moreover, the Gloss maintained in general terms that doubt does not affect good faith, whereas Adrian and Soto approved of prescription by a doubting possessor, only if certain conditions were met. Mancio provides concise summaries of these three opinions, containing arguments, which he finally would refute. We will discuss these paraphrases, taking into account also the early treatment of the issue by Medina and the original writings of the authors referred to.

3.1 The view of the Ordinary Gloss to the *Liber Extra*

The first view is that of the gloss *nulla temporis parte* to X 2.26.20, the canon *Quoniam omne*, which opinion is said to be followed by the Italian canonist Nicolaus de Tudeschis (1386-1445), also known as Panormitanus, and by the Italian Dominican Silvestro Mazzolini da Prierio (1456-1527), also known as Prierias.¹³ The gist of it is that doubt does not take away the good faith required for prescription.

Quoniam omne was canon 41 of the Fourth Lateran Council of 1215, which took place under Pope Innocent III († 1216). It was adopted in the *Liber Extra* as X 2.26.20. It ruled that a possessor should never during the entire period of prescription have the knowledge (*conscientia*) that the possession belongs to another. The gloss *nulla temporis parte* discussed the case where the possessor had a good reason (*iusta causa*) to doubt whether he is entitled. It ruled that, in view of D. 22.1.25.2, he is nevertheless considered to be in good faith and that he can acquire through prescription, despite his doubting conscience. The conscience is

¹² For the framework, used in early modern scholasticism to treat a certain subject, see Decock. W. & Birr, C., *Recht und Moral in der Scholastik der frühen Neuzeit 1500-1750* [Methodica – Einführungen in die rechtshistorische Forschung, 1], Berlin etc., 2016, pp. 67-68.

¹³ Sarmiento 1985, p. 283: De hac quaestione sunt variae sententiae. Prima opinio tenet partem affirmativam. Hanc habet Glossa super cap. finale *De praescriptionibus*. Item Panormitanus et Silvester verbo *Praescriptio* § 3. Et probatur ex cap. *Si virgo* 34 q. unica -ait Augustinus-: “possessor bonae fidei tamdiu iudicatur quamdiu possidere se ignorat alienum, si vero scit iam est in mala fide”; sed qui dubitat, ignorat et non scit an possideat rem alienam; ergo praescribit. Deinde: possessor qui dubitat, id est in dubio sine peccato, potest defendere rem suam, nam in dubiis melior est conditio possidentis; ergo habet bonam fidem. 3°. In cap. finali *De praescriptionibus* statuit Summus Pontifex eum qui praescribit non debere habere conscientiam rei alienae; sed qui dubitat non habet conscientiam rei alienae; ergo. Item: eodem capite 1° definit fidem bonam debere durare toto tempore a lege praescripto, ne peccatum alicui suffragetur; sed qui possidet in dubio, nihil peccat; ergo potest gaudere beneficio praescriptionis.

doubting, but not troubled (*laesa*) the gloss argued because the possessor does not yet know whether the object is another's property. He should consult others in order to find out the truth (with references to D.37 c.16 and C.23 q.8 c.14). In the commentary of Pope Innocent IV (1195-1254) on the *Liber Extra*, it was also argued that good faith which suffices for acquisition of fruits also suffices for prescription.¹⁴ It has to be noted, however, that D. 22.1.25.2 did not pronounce upon prescription by a doubting possessor. It ruled that as long as no eviction has taken place, the possessor of a plot of land is to be considered possessor in good faith and acquires the fruits by taking possession of these fruits, despite the fact he knows the land belongs to another.

This opinion of the Gloss was substantiated with three arguments. The first was the text from Gratian's Decree, mentioned above (C.34 q.1-2 c.5). From this text, more specifically the words "one is called correctly a possessor in good faith, as long as one does not know one possesses another's plot of land" it was gathered, as summarized by Mancio, that the one who doubts is still in good faith, since he does not know for sure that another is entitled (argument i). Accordingly, he acquires ownership through prescription. Secondly, there is the rule of law saying that "when in doubt the position of the possessor is the better one" (*in dubiis melior est conditio possidentis*). This rule is reminiscent of legal maxims, to be found in the Digest and in the *Liber Sextus*. In the Digest it is phrased as "when situations are equal, the position of the possessor should be the stronger one" (*in pari causa possessor potior haberi debet*, D. 50.17.128pr), in the *Liber Sextus* as "when the delicts or the situations are equal, the position of the possessor is the stronger one" (*in pari delicto vel causa potior est conditio possidentis*, VI 5.13.65). These maxims implied that, when two people, both claiming to be entitled to one and the same thing are equally at fault and have equal arguments to substantiate their claims, the position of the possessor, *i.e.* the one who actually has the thing among his belongings, should prevail. He may defend his position, while the burden of proof will rest on the other party. In the new phrasing the 'equal situation' was replaced by 'when in doubt'. Applied to the question under dispute, it would imply that a possessor who is in doubt, may defend his position and that his possession is not illegitimate and apparently suffices for prescription (argument ii).

In the third place, the canon *Quoniam omne* (X 2.26.20) ruled that in order to acquire a right through prescription one should not be aware of the fact it is another man's thing one possesses (*conscientia rei alieni*). However, this would not apply to the one who is in doubt (argument iii). Furthermore, the same canon ruled that good faith is required during the entire period of prescription, so that sin will not benefit anyone.¹⁵ Again, the one who possesses in doubt does not commit any sin. As a consequence, he may enjoy the benefit of prescription (argument iv).

As stated above, Panormitanus and Prierias would have endorsed this view of the Gloss. In his commentary to the canon *Quoniam omne* (X 2.26.20) Panormitanus referred to C.34 q.1-2 c.5, mentioned above. The words of Augustine, quoted there, would prove that also the doubting possessor is in good faith and will acquire through prescription, as in X 1.4.8 and X

¹⁴ *Commentarii Innocentii Quarti Pontificis Maximi super libros quinque decretalium*, ed. Frankfurt am Main 1570, fol. 303vb (ad X 2.26.20, n. 2).

¹⁵ X 2.26.20 Non in foro canonico nec civili valet praescriptio cum mala fide. Idem in concilio generali. Quoniam omne, quod non est ex fide, peccatum est, synodali iudicio diffinimus, ut nulla valeat absque bona fide praescriptio tam canonica quam civilis, quum generaliter sit omni constitutioni atque consuetudini derogandum, quae absque mortali peccato non potest observari. Unde oportet, ut qui praescribit in nulla temporis parte rei habeat conscientiam alienae.

2.26.15. Moreover, in C. 7.32.1 (prescription starts to run as soon as someone is informed that he has acquired possession through an intermediary) Panormitanus did not read the counterargument: that lack of knowledge can prevent prescription from starting because in that text the recipient of the possession was initially not aware of the fact that he had gained possession (through an intermediary) and in such a situation he was neither in good faith nor in bad faith.¹⁶

In his *Summa Summarum*, a manual for confessors, also termed the *Summa Sylvestrina*, Prierias first described the opinion of the Gloss and Panormitanus, that the doubting possessor has to make inquiries and should be prepared to part with his possession but that at the same time he has the good faith required for prescription. Subsequently, Sylvester referred to various deviating opinions. In his commentary on X 2.26.20, Antonius de Butrio (1338-1408) taught that doubts will wipe out the required good faith, at least if these doubts are serious and plausible. The legal provisions not only require not to be in bad faith, but also to be in good faith. The *Summa rosella* of the Franciscan Baptista Trovamala de Salis († after 1494) would have followed the same opinion, albeit without drawing distinctions, while according to the *Summa Angelica* of Angelus de Clavasio (1411-1495) doubts do not take away good faith for the *forum externum*. Eventually Prierias presented his own view, following the teachings of Bartolus de Saxoferrato (1313-1357) ad D. 41.3.5 (n. 9), that doubt at the beginning (when possession was acquired) excludes good faith, but that later emerging doubt does not.¹⁷

3.2 The view of Adrian of Utrecht

The second opinion, brought up by Mancio, is that of Adrian of Utrecht (1459-1523), better known as the later Pope Hadrian VI.¹⁸ It is derived from his commentary on the Fourth Book of the Sentences, reflecting the lectures Adrian presented, presumably between 1499 and 1509, at the University of Leuven.¹⁹ The gist of this opinion is that doubt takes away good faith as required for prescription. For that reason, Medina had presented the opinion of Adrian as opposed to that of the Gloss and Panormitanus.²⁰ In the approach of Mancio, however, both opinions, *i.e.* that of the Gloss and that of Adrian, have in common that they do not utterly

¹⁶ Panormitanus, *Commentaria* V (super tertia parte secundi libri decretalium), ed. Venice 1617, ad X 2.26.20, n. 40 (fol. 47rb).

¹⁷ *Sylvestrinae summae pars secunda*, ed. Antwerp 1578, ad verbum ‘praescriptio I’ (p. 305). This would be confirmed by the text of C.34 q.1-2 c.5: the woman did not realize she married a man, who was already someone’s husband. Her later knowledge of the truth would make her commit adultery, but knowledge should be taken here as knowing for sure and not as doubting.

¹⁸ Sarmiento 1985, pp. 283-284: Secunda opinio est Adriani in materia de restitutione, ubi dicit duo. Alterum est: possessor qui dubitat rem esse suam, non potest eam sine peccato possidere nec praescribere. Ratio huius est quoniam talis conscientia est laesa. Item probat nam uxor quae dubitat an iste maritus sit suus, stante dubio non potest petere nec reddere debitum; ergo similiter possessor qui dubitat, non potest rem possidere. Deinde: qui facit aliquid de quo dubitat an sit peccatum mortale, peccat mortaliter, sed qui possidet rem in dubio furti opus de quo dubitat an sit peccatum mortale; ergo etc. Probatur minor nam furtum est detentio, id est acceptio rei alienae invito domino; sed iste dubitat an retineat rem alienam; ergo dubitat an furetur. Et confirmatur: bene valet: retineo rem alienam invito domino; ergo commit furtum. Antecedens est dubium; ergo et consequens. Sedundum dictum Adriani est quod si possessor qui dubitat, reservet illam rem dominio proprio; quando comparaverit et fecerit sufficientem diligentiam, bene praescribit. Hoc probat quoniam tunc habet bonam et integram fidem.

¹⁹ The question whether the doubting possessor may retain the possession until its true owner is found, was also discussed briefly in the second quodlibetal question of Adrian.

²⁰ Medina, p. 116.

reject the idea that doubt is incompatible with good faith. The Gloss, followed by Panormitanus, taught more generally that doubt does not affect good faith. Adrian maintained as a general rule the opposite, but acknowledged, as will be explained below, that there are specific circumstances, which do allow the doubting possessor to prescribe.

From Adrian's teachings Mancio derives two statements, *viz.* that a doubting possessor has a troubled conscience (*conscientia laesa*) and that he can acquire ownership through prescription in an exceptional case, *i.e.* when the acquisition of possession cannot be seen as occupation against the wish of the owner. Adrian had first described the opinion of the Ordinary Gloss to X 2.26.20 and the teachings of Panormitanus. The latter's interpretation of C.34 q.1-2 c.5 he rejected. Augustine did not use the words 'not knowing (*nescire, ignorare*)' in the sense of 'doubting on the basis of a plausible ground (*ex probabili causa*)' but in the sense of erring, having a false conviction (*falsa crudelitas*), *i.e.* being convinced something is true which in reality is not true. Accordingly, the woman who voluntarily had sexual intercourse with a man, while being in a state of doubt as to whether he is married to another woman, is not excused from adultery. This opinion would be supported by X 4.21.2 and X 5.39.44.²¹ Likewise, the possessor who, on the basis of a plausible ground (*ex probabili causa*) doubts whether an object is his, commits a sin by retaining it. If he, notwithstanding his doubts about proper entitlement, wishes to keep it, he commits a mortal sin, *viz.* theft. The *regula magistralis* rules that running the risk of committing a mortal sin, is a mortal sin itself.²² Theft is holding something against the owner's wish. The one who is in doubt whether the thing he holds belongs to another, is in doubt whether or not he commits theft. If one doubts the former, one will also doubt the latter. For the argument that running the risk to sin, is a sin in itself, other authors sometimes referred to the biblical texts upon which this argument was supposed to be based, such as "he that loves danger, shall perish therein" (Sir 3.26) and "whatever does not proceed from faith, is sin" (Rom 14.23).²³ From the latter text many moral theologians gathered that good faith would require to act under the conviction that the act is permissible. The idea that retaining something while in a state of doubt is theft, also implies that a doubting possessor can have no legitimate possession.

The second statement of Adrian concerns the exceptional case where the possessor in bad faith or in doubt cannot be considered to occupy a possession against the owner's will *i.e.* when, from the beginning, he is prepared to give back and is convinced of the necessity to perform a thorough examination in order to find the genuine owner but at the end of the required period for prescription, still has possession.²⁴ According to Mancio's paraphrase, Adrian taught that in such a case the possessor has good faith and will acquire ownership.

3.3 The view of Domingo de Soto

²¹ The case of X 4.21.2 is not identical to the case of C.34 q.1-2 c.5. In the decretal, the woman was not sure whether her first husband had died. She may not refuse marital duties to her second husband but cannot demand such duties from him. If she finds out her first husband is alive, she has to dismiss the second one.

²² Hadrianus, *Quaestiones in quartum sententiarum librum*, ed. Paris 1528, fol. 52rb-va (De sacramento penitentie, de restitutione § Hoc supposito primo decidam).

²³ See e.g. Medina and Bañes.

²⁴ Hadrianus fol. 53ra-53va (De sacramento penitentie, de restitutione § Tertia est opinio).

The third opinion, brought up by Mancio, is the one of his own master Domingo de Soto.²⁵ The doubting possessor may justly defend his position until the possession is vindicated in court. He will not enjoy, however, the benefit of prescription because as soon as he becomes aware of the fact that the thing belongs to another, he has to restore it, even if the time required for prescription has lapsed. The first statement is reminiscent of D. 22.1.25.2. The second seems obscure because becoming aware the thing belongs to another, will put a stop to the doubt. The argument is explained more fully in Soto's own work *De iustitia et iure*. At the time one starts doubting on the basis of a plausible conjecture (*probabili coniectura*), prescription comes to an end, it says because the conscience is affected (*vulnus conscientiae*) and there is no longer good faith. 'Good' (*bona*) is the same as 'sound' (*sana*) and 'easy' (*quieta*).²⁶ This opinion comes close to that of Mancio. Below it will become clear, that Mancio only in one respect disagrees with Soto, viz. where Soto acknowledged an exception, quite similar to the one of Adrian.

4. Three 'notes'

After having presented this survey of existing opinions in favour of acquisition through prescription despite a doubting conscience, Mancio formulates three 'notes' or 'observations'. Firstly, doubting is not the same as having a lax conscience because the latter always involves a sin, for example, by knowing that the possession belongs to another and not being prepared to restore it; or, doubting and not being prepared to carefully find out the truth.²⁷ Doubting is being uncertain, which does not turn the conscience lax, because "when in doubt, the position of the possessor is the better one" (*in dubiis melior est conditio possidentis*).²⁸

The second note says there are two kinds of doubt, viz. speculative doubt and practical doubt, which dichotomy is said to be further explained in X 5.39.44 and C.23 q.1 c.4.²⁹ One of the first moral theologians who adopted a scholastic distinction between *dubium speculativum* and *dubium practicum* was Juan de Medina. *Dubium speculativum* is doubt concerning a fact or faculty, viz. the exact condition of the object: who is its owner? This

²⁵ Sarmiento 1985, p. 284: Tertia opinio est Magistri Soti in 4 *De iustitia* q.5 a. ultimo. Dicit namque, quod possessor qui dubitat rem esse suam, potest iuste illam defendere, quoadusque convincatur in iudicio; non tamen gaudeat beneficio praescriptionis, nam continuo atque cognoverit rem fuisse alienam, non obstante praescriptione, tenetur eam restituere.

²⁶ Dominicus Sotus, *De iustitia et iure libri decem*, ed. Salamanca 1553, Lib. IV, q. 5, art. 4 (p. 326).

²⁷ Sarmiento 1985, pp. 284-285: Ex expositione huius notandum est aliud est habere conscientiam laxam et aliud dubitare. Conscientia laxa semper est coniuncta cum peccato, veluti cum quis intelligit se rem alienam possidere et non vult restituere, scilicet cum quis dubitat et non vult facere diligentiam ut assequatur veritatem. Habere dubium est esse in ancipite: cum quo dubio possessor non habet laxam conscientiam, nam in dubiis melior est conditio possidentis.

²⁸ Previously, Vitoria had rejected the obvious link between sin and good faith. He taught that prescription requires a probable title (*probabilis titulus*) and the conviction to have acquired from the owner, which is a factual requirement, not to be described in terms of sinful or not sinful. Cf. Francisco de Vitoria, *De iustitia* (ed. V. Beltrán de Heredia), part I, Madrid, 1934, ad ST II II 66 art.1, n. 48 (pp. 104-105).

²⁹ Sarmiento 1985, p. 285: Item notandum quod duplex dubium, speculativum et practicum. Quod explicatur in cap. *Inquisitioni*, *De sentendo excommunicationis* et in cap. *Quid culpatur* 33 q.1. Verbi gratia, mulier quae dubitat an maritus iste sit suus, dubitat speculative; ceterum practice certa est quod tenetur recidere debitum. Est aliud exemplum: milites, qui dubitant an id bellum sit iustum, dubitant speculative; ceterum practice certi sunt quod tenetur parare suo principi: alias destruetur respublica.

doubt does not necessarily exclude good faith. *Dubium practicum* is doubt concerning how to act, viz. whether it is permissible to retain the object or not. In order to clarify the distinction, Medina gave an example: if I buy from Peter, not knowing for sure that Peter is the owner or even knowing he is not, but supposing that in all probability Peter has authority to alienate the object, the doubt is speculative. In such a case prescription will run, while the conscience is in doubt. However, if I do not only doubt about a quality of the object but also whether I am allowed and entitled to justly retain the possession, the doubt is not only speculative, but also practical. This practical doubt affects the conscience, it wipes away good faith and prevents prescription from running. As a consequence, the woman in doubt whether her husband died, as in the case of X 4.21.2, may perform the marital duties when demanded. She is in doubt about a fact but, being primed by learned men, is probably convinced she has to perform these duties, when her second husband desires so. All this according to Medina.³⁰ Mancio brings up a similar but slightly different distinction between these two kinds of doubt: speculative doubt results from a more theoretical reflection, practical doubt from a conviction about what is right or wrong to do. He produces two examples of merely speculative doubt. The woman who doubts her husband is really hers, doubts speculatively. From a practical point of view, she can at the same time be confident she has to perform her marital duties. Similarly, soldiers who doubt the war they are fighting is a just war, doubt speculatively. From a practical point of view, they are at the same time confident they have to obey their commander. If it were otherwise, the state would collapse.³¹

The third note holds that one can doubt a certain quality of a thing but be confident as regards another quality.³² One can be confident in having the condition required for Baptism, but doubt whether one has the required condition for receiving the sacraments of Penance and the Eucharist. Similarly, one can doubt whether the plot of land one possesses belongs to another and at the same time be confident there is no duty to restore the plot of land right away. The same can be said about the doubt of the woman.

5. Mancio's four *conclusiones*

Subsequently, Mancio formulates four conclusions (*conclusiones*). The first implies that good faith, as required for prescription, is human good faith, which cannot possibly exist in being absolutely sure about one's entitlement; despite the remaining doubt and fear of the opposite, prescription is still legitimate.³³ What suffices is the consciousness with which

³⁰ Medina, pp. 117-118. Previously Medina had explained that X 4.21.2 refers to the *forum externum*. If doubt continues to exist in conscience, the woman should abstain in order to avoid the risk of committing adultery.

³¹ For the distinction between speculative and practical judgments in the later Jesuits see Stone, M.W.F. and Van Houdt, T., "Probabilism and its methods. Leonardus Lessius and his contribution to the development of Jesuit casuistry", *Ephemerides Theologicae Lovanienses* 75 (1999), pp. 359-394, at pp. 371-375.

³² Sarmiento 1985, p. 285: 3°. Notandum quod potest quis dubitare de eadem re circa unum effectum et esse certus circa aliud. Verbi gratia, potest esse aliquis certus quod dispositio quod habet sit sufficiens ad baptismum, et dubitare an sit sufficiens ad poenitentiam et ad sacramentum Eucharistiae. Non aliter qui dubitat an fundus quem possidet sit alienus, est certus quod non tenetur continuo illum restituere. Idem dicendum est de uxore dubia.

³³ Sarmiento 1985, pp. 285-286: His positis, sit prima conclusio: ad legitiman praescriptionem sufficit fides humana, licet non habeat omnem certitudinem; volo dicere quod, licet maneat scrupulus et formido in contrarium, legitima est praescriptio. Nam ea cognitio sufficit ad praescriptionem, qua

people usually possess their things. That is: human good faith and the consciousness required is dependent on what the nature of things permits because as Aristotle taught, only a disordered tendency requires the same certainty in all things (*indisciplinati ingenii est eandem in omnibus exigere certitudinem*). As regards the things we discuss here, there is no other certainty than that of human good faith.³⁴

The second conclusion is that the doubting possessor with a just title defends his possession until the court decides against him.³⁵ According to Mancio this would follow from the principle “when in doubt the position of the possessor is the better one” (*in dubiis melior est conditio possidentis*) of VI 5.13.65. However, what Mancio quotes here, is the principle in its sixteenth century phrasing. The maxim of VI 5.13.65 reads “when the delict or the situation are equal, the position of the possessor is the stronger one” (*in pari delicto vel causa potior est conditio possidentis*). What Mancio has in mind here, is the Roman principle that a possessor has the procedural advantage of awaiting the plaintiff’s evidence. The burden of proof does not rest upon him. This is confirmed by Mancio’s reference to D. 43.17.2, which text reads “no matter what kind of possessor one is, because of the mere fact of being possessor, he has a stronger position than a non-possessor” (*qualiscumque enim possessor hoc ipso, quod possessor est, plus iuris habet quam ille qui non possidet*).

The third conclusion implies that a doubting possessor will never acquire ownership through prescription.³⁶ This would follow from D. 41.1.48, mentioned above, more specifically from the words which Mancio quoted as “a buyer in good faith and not in doubt”. According to Mancio, the legislator had drawn here an explicit distinction between good faith and doubt. Accordingly, doubting faith is not the same as good faith. However, in Mancio’s quotation, the sequence of the words is altered and the conjunction ‘and’ (*et*) is added. Actually, the text of D. 41.1.48 reads “the possessor in good faith undoubtedly makes the fruits his own” (*bonae fidei emptor non dubie (...) fructus (...) suos (...) facit*) and not “a buyer in good faith and not in doubt” (*emptor bonae fidei et non dubiae*). The text does not draw any distinction and merely speaks about possessors in good faith. Mancio nevertheless concludes on the basis of this text, that good faith should be intact (*integra*) and sound (*sana*), whereas insecure faith is not sound but rather, bothers the conscience. As a consequence, doubts exclude the state of being in good faith. Furthermore, he argued that as all legal provisions say, prescription and the required good faith come to an end by mere joinder of

homines communiter res suas solent possidere; ea autem est fides humana; ergo. Deinde: ea cognitio exigenda est quam natura rei patitur, nam ut ait Aristoteles, indisciplinati ingenii est eandem in omnibus exigere certitudinem; sed haec materia de qua tractamus non habet aliam certitudinem nisi certitudinem fidei humanae; ergo.

³⁴ What is called here a statement of Aristotle, was in fact a paraphrase of Thomas Aquinas (1225-1274) in the third *lectio* of his commentary of Aristotle’s *Ethics*.

³⁵ Sarmiento 1985, p. 286: *secunda conclusio*: possessor qui dubitat rem esse suam, iusto titulo illum defendit quoadusque in iudicio condemnetur. Haec est certissima, nam habetur in *Regula iuris* regula 66 quod in dubiis melior est conditio possidentis et ff. *Uti possidetis* lege iusta.

³⁶ Sarmiento 1985, pp. 286-287: *Tertia conclusio*: qui possidet in dubio, numquam praescribit. Probatur hoc ff. *De acquirendo rerum dominio* lege 43, scilicet *Emptor*, ubi dicitur: emptor bonae fidei et non dubiae etiam ex re aliena facit fructus suos. In qua sententia legislator manifestam ponit differentiam inter bonam fidem et dubiam; ergo dubia fides non est bona fides. Deinde: bona fides idem est quod integra et sana; sed fides dubia non est fides sana, sed mordet conscientiam; ergo non est bona fides. Ultimo: per solam litis contestationem interrumpitur praescriptio et bona fides quae ad praescriptionem est necessaria, ut omnia iura clamant; sed litis contestatio tutum facit rem dubiam; ergo cum dubia fide non est praescriptio.

issue (*litis contestatio*) i.e. when the possession is claimed in court. Joinder of issue turns certainty into uncertainty. Thus, when in a state of doubt, there can be no prescription.

The fourth conclusion is the most extensive. Mancio starts by referring to the opinion of his own master, Domingo de Soto, who stated that a woman in doubt as to whether her matrimony is valid, but shows sufficient care, may demand and perform marital duties because she is in good faith.³⁷ Consequently, a possessor, showing sufficient care to find out the truth, despite not managing to expel all doubts, from that time starts to prescribe. Soto had expressed this opinion in his commentary on the fourth book of the Sentences.³⁸

Subsequently, Mancio refers to three arguments which may support this view.³⁹ First, if no prescription takes place, it will always remain uncertain who the owner is. This was one of the traditional arguments, derived from D. 41.3.1 and X 2.26.5, to justify prescription. Secondly, after observing sufficient care, there is no other way to acquire ownership of things. This argument is not further explained and remains somewhat obscure. Thirdly, after joinder of issue and a judicial sentence in favour of the possessor, prescription will certainly start to run despite the fact that until that time speculative doubt had persisted. As a consequence, remaining in candid uncertainty, after having observed sufficient care, is no obstacle for prescription to run.

This having been said, Mancio maintains that this fourth conclusion (in the case of sufficient care, prescription takes place) is only a plausible opinion and that the opposite vision (despite sufficient care, no prescription takes place) is more plausible.⁴⁰ He criticizes the former because of its consequence that good faith, required for prescription, is the same as that required for legitimate possession. This he explains as follows. A doubting possessor either observes sufficient care or not. If he does not, he commits a sin by possessing. If he does, this faith obviously allows him to possess but would also suffice for prescription. Thus, the faith required for prescription would be the same good faith that is adequate for legitimate possession. However, as shown above this is not the case.

³⁷ Sarmiento 1985, p. 287: Quarta conclusio: possessor qui fecit diligentissime diligentiam ad assequendam veritatem, et non potuit evincere dubium, ex tunc incipit praescribere. Haec est sententia Soti loco commemorato et *In 4* dist. 27 q. 1 a.3: dicit enim quod mulier quae dubitat an iste maritus sit suus post sufficientem diligentiam, potest petere et reddere debitum, quoniam iam est in bona fide.

³⁸ *Commentariorum fratris Dominici Soto (...) in Quartum Sententiarum*, Tom. II, ed. Salamanca 1569, pp. 104-110 (dist. 27, q. 1, art. 3).

³⁹ Sarmiento 1985, p. 287: 2°. Probatur haec sententia: nam alias rerum dominia essent incerta in perpetuum contra finem legis praescriptionis, quae in hoc est instituta, ne maneret rerum dominia incerta. Probatur sequentia: nam post factam sufficientissimam diligentiam, non restat alia via ad inveniendum rerum dominium. Ultimo: si esset contestata lis et pronuntiata sententia in favorem possidentis, certum est quod incipit praescriptio; et tamen adhuc perseverat dubium speculativum; ergo fides dubia post factam diligentiam non tollit praescriptionem.

⁴⁰ Sarmiento 1985, pp. 287-288: Haec quarta conclusio est tantum probabilis et opposita videtur mihi probabilior, nam ex ista conclusione sequitur quod ea fides sufficit ad praescriptionem, quae sufficit ad legitimam possessionem, cuius contrarium supra demonstratum est. Probatur sequentia: nam vel ille qui possidet in dubio facit sufficientem diligentiam vel non; si non facit, peccat possidendo; si facit, ea fides sufficit ad praescriptionem; ergo ea fides sufficit ad praescriptionem, quae satis est ad legitimam possessionem.

Eventually, Mancio opts for the more plausible view.⁴¹ He substantiates this view primarily with his interpretation of X 5.39.44, where the Pope maintained that a woman, doubting whether the man is her husband, cannot demand performance of the marital duties he owes her. This results from being in doubt, Mancio argues, not from being negligent. Negligence would prevent her from performing these duties. If the Pope had intended to say that after observing sufficient care, the woman could demand and perform the marital duties, nothing would have been easier than to rule that after observing sufficient care, the man and woman are secure and safe in conscience to perform and demand these duties. However, that is not what the Pope stated here. He merely said that, as long as there is doubt, the duties owed are performed but not claimed. A woman who doubts the man is her husband is, after observing sufficient care, held to perform but cannot demand marital duties. Similarly, a doubting possessor, after observing care *i.e.* after making inquiries to find out the truth, cannot acquire ownership through prescription, although he does legitimately possess the thing.

6. Mancio's response to the arguments of Panormitanus and Adrian

To conclude his treatment of the question, Mancio refutes the arguments proposed by Panormitanus and Adrian. He had already partly rejected the opinion of Adrian in the fourth conclusion, together with that of Soto. The arguments of Panormitanus appear to be those substantiating the opinion he had previously labelled as that of the Ordinary Gloss to the *Liber Extra*. Mancio does not pronounce upon the argument of D. 22.1.25.2, *i.e.* that as long as no eviction has taken place, the possessor of a plot of land is to be considered in good faith and acquires the fruits by taking possession of these fruits, despite the fact he knows the land belongs to another. Medina, however, had done so previously. He considered the possessor in this provision to be in good faith only in view of acquiring the fruits. He is not in good faith in view of acquiring ownership. Moreover, the term good faith is used here in the sense of thinking the thing was not stolen and the vendor had authority to alienate.⁴² It seems that Mancio tacitly adopts a similar view.

(i) The first argument refuted by Mancio, is the one which interpreted the ignorance of the possessor, mentioned in the quotation of Augustine in C.34 q.1-2 c.5, as doubting ignorance.⁴³ However, Mancio draws a distinction between two kinds of ignorance, as Adrian had done before him.⁴⁴ One is the ignorance of the mere lack of knowledge, which goes hand in hand with doubting on a probable ground. The other is a misinterpretation of things, which makes

⁴¹ Sarmiento 1985, p. 288: 2°. Mulier quae dubitat utrum iste maritus sit suus post factam diligentiam, non potest petere debitum, licet teneatur reddere; ergo possessor in dubiis post factam diligentiam, non potest praescribere, licet possit possidere. Probatur antecedens, nam in cap. *Inquisitioni*, *De sententia excommunicationis*, negat Summus Pontifex posset peti debitum; eo in casu propter dubium, non propter negligentiam, nam si esset propter negligentiam non posset reddere debitum. Item: si Summus Pontifex voluisset asserere quod facta diligentia posset peti et reddere debitum, quid facilius quam praescribere et definire quod, facta sufficienter diligentia, sint securi et tuti in conscientia petendo et reddendo debitum. Hoc tamen non definivit Papa, sed tantummodo quod, stante dubio, redderetur debitum, non peteretur.

⁴² Medina, p. 117.

⁴³ Sarmiento 1985, p. 288: Ad argumenta in contrarium pro opinione Panormitani. Ad primum respondetur quod ignorantia est duplex: altera est purae negationis, quae stat cum dubio probabili; altera est pravae dispositionis, qua quis iudicat certo rem esse suam, quae revera non est. Et haec excludit dubitationem, sicut et scientia; et de hac loquitur Augustinus.

⁴⁴ Medina, p. 117.

one confident to be entitled, which in reality is not the case. The latter ignorance, just as knowledge, excludes doubt and this is the ignorance Augustine is talking about. Thus, the possessor who according to Augustine can acquire through prescription, is not doubting that he is entitled. He is convinced that he is. Despite his ignorance of the truth, he is in good faith.

(ii) The second argument refuted is the one which identified the good faith required for legitimate possession with the good faith required for prescription.⁴⁵ According to Mancio, such an assumption is false. Doubt prevents prescription from running, not so much because it would be impossible to possess something in doubt, but because a doubting faith is not sound (*sana*) and intact (*integra*), which is a requirement for prescription.

(iii, iv) The third and fourth arguments refuted are those derived from X 2.26.20.⁴⁶ The canon *Quoniam omne* required three things, viz. that the possessor does not know another is entitled, that he does not commit a sin through the act of possessing, because no one should benefit from sins, but the most important is the requirement of good faith which should be sound (*sana*) and intact (*integra*), which is incompatible with being in doubt.

Finally, Mancio refutes three arguments, allegedly adduced by Adrian of Utrecht.⁴⁷ However, some of these are hard to find in Adrian's writings. It may be that Mancio assumes these arguments tacitly underlay the opinion of Adrian that under certain conditions a doubting possessor can prescribe. The first is the view that a doubting possessor has no bad conscience in possessing because "when in doubt the position of the possessor is the better one" (*in dubiis melior est conditio possidentis*). Mancio rejects this opinion with his well-known argument that the one who doubts has no intact faith (*fides integra*) for prescription. The second is the premise, which some derived from C.34 q.1-2 c.5, viz. that also the doubting possessor is in good faith and will acquire through prescription. As Mancio had stated previously, the opposite clearly results from X 4.21.2 and X 5.39.44. The third premise Mancio rejects together with the conclusion based on it, is the idea that a doubting possessor cannot possess legitimately. Doubt does not make him a thief. There can only be theft, if one retains a possession when knowing or culpably not knowing another is owner. Otherwise the ignorance is not culpable. Furthermore, in the latter case the doubt is speculative *i.e.* based on theoretical reasoning, but practical faith is present because the possessor is confident to be entitled to the possession. Similarly, as regards one and the same thing, a certain effect can be doubtful, whereas another is beyond doubt.

⁴⁵ Sarmiento 1985, p. 288: ad secundum negatur consequentia. Ratio enim quare fides dubia impedit praescriptionem, non est quia stricte dubio non possimus rem possidere, sed quoniam fides dubia non est sana et integra, quae est necessaria ad legitimam praescriptionem.

⁴⁶ Sarmiento 1985, p. 289: Ad tertium et ad quartum argumentum ex capite finali *De praescriptione* respondetur tria esse necessaria ex definitione illius capitis, ut quis praescribat: primum est quod non habeat conscientiam rei alienae; deinde quod non peccet in possidendo, nam peccatum nulli debet suffragari; praecipue vero quod sit integra et sana fides, cui adversatur dubia fides.

⁴⁷ Sarmiento 1985, p. 289: Ad argumenta Adriani. Et ad primum respondetur quod qui possidet in dubio, habet bonam conscientiam ad possidendum, nam in dubiis melior est conditione possidentis. At vero non habet integram fidem ad praescribendum. Ad secundum nego antecedens, nam contrarium definitur manifeste cap. *Dominus*, *De secundis nuptiis* et cap. *Inquisitioni* superius allegato. Ad tertium nego minorem; et ad probationem nego consequentiam, nam furtum tantum est quando ex scientia vel ex culpabili ignorantia retineo rem alienam; ceterum in hoc casu est inculpabilis ignorantia. 2°. Dico: iste dubitat an res sit sua speculative, ceterum practice certus est quod sit sua quantum ad possessionem. Item dico quod est dubius de eadem re circa unum effectum, et est certus circa alium effectum.

7. A range of opinions

The question, discussed by Mancio, is illustrative for the pluralistic and dialectic character of early modern scholasticism. Mancio does not present merely his own doctrine and own arguments but an entire range of different opinions, all with their own specific authoritative texts, arguments, frailties and strengths, pros and cons, advantages and disadvantages, etc. In a process of comparing and balancing the arguments, he establishes his own position. The main views on the consequences of being in doubt as to who is entitled, appeared to be the following. As a matter of fact, some of these views can go hand in hand but they do not always do so.

(i) Firstly, there was the idea that doubt does not affect good faith as required for acquisition of fruits and does not deprive the possessor of his advantageous procedural position (*Passivlegitimation*). Taking possession is not permissible when in a state of doubt regarding entitlement, but once in possession, doubt does not oblige the one in possession to abandon possession, the only exception being the right of the true owner to take possession. The main argument was found in D. 22.1.25.2 and in the maxim “when in doubt the position of the possessor is the better one (*in dubiis melior est conditio possidentis*)”. Such an approach can be traced, for example, in the *Codex de restitutione et contractibus* of Juan de Medina, published in 1546. According to Medina the statement of Adrian that the doubting possessor sins by exposing himself to the danger of committing theft, is not entirely true. A distinction should be drawn. When in equal doubt as to whether the object is his or belongs to Peter, the possessor is under no obligation to give it to Peter. In case of equal interests, it is permissible to act in one’s own interest. The possessor can retain possession as long as he is prepared to restore it when the truth is established.⁴⁸

(ii) Secondly, there was the opposite view, defended, for example, by Adrian. Retaining possession, while being in doubt, is theft. This can be seen as applying the *regula magistralis*, which rules that in case of doubt, one has to choose the safe side, *i.e.* to follow the course of action which cannot possibly affect the conscience (*in dubiis tutior pars est eligenda*) even if there is a good chance that the risky but more advantageous course of action will neither affect the conscience. Thus, if a possessor has reason to doubt, there are in theory two possibilities: either he himself is entitled to the object or another would be entitled. In order to avoid committing a theft, he should act according to the latter situation and abandon his possession.

(iii) In the third place, there was the view that doubt does not take away the good faith required for prescription. When in doubt, a possessor may be under the obligation to make inquiries in an attempt to establish the truth; but when the required period of time has lapsed without finding the owner, he will, despite his doubts, acquire ownership. As we saw, this was

⁴⁸ However, in case the possessor is in doubt whether the thing belongs to Peter or to John, retaining the possession is not allowed. See Medina, p. 118: Corrolarie sequitur, non est indistincte verum, quod ait Adrianus, (...), quod qui rem aliquam detinet, dubius an sit aliena, peccet: quia se periculo furti exponit: si enim dubitat an sit sua, an Petri, ubi dubium est aequilibre, non tenetur rem Petro dare, etiamsi tute possit; eo quod forte id cederet in praeiudicium suum, quia forte res est sua: modo autem magis tenetur homo suae indemnitate quam alienae consulere, ubi caetera sunt paria. (...) Secus ubi possidens rem scit non esse suam, dubitat tamen an sit Petri, an Ioannis: tunc non potest iuste rem illam sibi ipsi retinere, nisi de consensu illorum, qui suam esse praetendunt.

the opinion of the Gloss to the *Liber Extra* and Panormitanus. Strangely enough, this view, which seems to establish the rule for the *forum externum*, was brought up by Mancio while discussing the *forum internum*, and not just from a comparative perspective. The view was presented as clashing with other opinions, which clearly pronounced upon obligations in conscience. This approach suggests that some scholars defended the validity of certain rules of law also for the realm of moral theology. In any event, it is illustrative of the interwovenness of legal and theological reasoning and the distinct role of legal provisions and arguments in moral theological thinking.

(iv) As a matter of fact, this third opinion was also not tenable from the perspective of tutorism. The one who retains possession while being in doubt, runs the risk of committing theft and accepting that risk is a sin in itself. Accordingly, after making such a wrong choice, his faith cannot be said to be intact (*integra*), sound (*sana*) and stable (*non vacillans*), as required for prescription.

(v) Adrian and Soto on the one hand stuck to the *regula magistralis*, but on the other did not apply it in an unequivocally rigoristic manner. The doubting possessor is under a continuous moral obligation to seek the truth. Moreover, he has to part with the possession as soon as he finds the true owner. However, if he did not yet succeed in finding the latter by the required time for prescription came to an end, he acquires ownership. His conduct cannot be qualified as sinful. He did not occupy the possession against the owner's wish. Thus, he is no thief and does not lack the requisite good faith for prescription. This fifth opinion comes close to the third.

(vi) Finally, there was the opinion, that once prescription had started in good faith, later emerging doubt would not put an end to prescription. This rule was already defended by Bartolus in his commentary upon D. 41.3.5.⁴⁹ From the perspective of Roman law, this goes without saying because even later emerging bad faith would not cancel out the prescription. The latter principle was expressed in the medieval maxim '*mala fides superveniens non nocet*', based on *i.a.* D. 41.3.15.2. As seen above, the same principle was applied to doubt. Prierias defended this view in his *Summa Sylvestrina*, published in 1516. He stated that this rule *i.e.* later emerging doubt does not extinguish the prescription, would also be the rule for the *forum internum*. Only the sincere conviction to possess in bad faith can put an end to prescription. Doubt has no effect.

Prierias substantiated the rule with a new theoretical basis: "since doubt stands midway between two contradictory opinions, if it affects one of these, it does not cancel it out to a greater extent than it does the other, and if circumstances do not change preference should be given to the opinion adhered to at first and the position of the possessor is the stronger one."⁵⁰ Applied to the doubting possessor, the two contradictory opinions probably are 'I can retain the possession' and 'I have to abandon the possession'. If the possessor adhered to the former opinion and subsequently, his choice was affected by doubt, the doubt would not wipe it away and the initial opinion is the one he should follow since he already 'possessed' it. That would

⁴⁹ Bartolus ad D. 41.3.5 n. 9-10, see *In primam partem Digesti Novi Bartoli a Saxoferrato commentaria*, ed. Basle 1588, p. 293.

⁵⁰ *Sylvestrinae summae pars secunda*, ed. Antwerp 1578, ad verbum 'praescriptio I' (p. 305): Quod etiam probat ratio: quia cum dubitatio aequaliter mediet inter contradictorias opiniones, si uni supervenit, eam non tollit plus quam aliam: et caeteris paribus fauendum erit illi, quae prius inerat et potior erit conditio possidentis.

imply that Prierias applied the maxim “when in doubt the position of the possessor is the better one (*in dubiis melior est conditio possidentis*)” not to the protection of possession of an object (the level of the law of property) but to the protection of the ‘possession’ of a certain moral conviction (the level of moral theology). In conscience, the possessor is allowed to stick to his initial assumption that he can retain, despite his later arising doubts *i.e.* that there can be a moral duty to abandon possession. If this is indeed the purport of this statement of Prierias, it looks like a precursor of the later probabilism, which adopted the maxim “when in doubt the position of the possessor is the better one (*in dubiis melior est conditio possidentis*)” as a fundamental moral-theological principle, implying that when in doubt which precept to obey or what line of action to follow, one is free to adopt any plausible view and does not have to follow the most plausible one.⁵¹ However, in the secondary literature Prierias is usually labelled as antiprobabilist.⁵²

8. Mancio’s own position in the debate

Juan de Medina and Mancio stood on the threshold of a tradition, discussing the consequences of the possessor’s doubt as to who is entitled to his possession, specifically about the possibility of acquiring ownership through prescription. Mancio did not identify the good faith required for legitimate possession with the good faith required for prescription. The first was not entirely incompatible with having doubts. Here, Mancio applied the maxim “when in doubt the position of the possessor is the better one (*in dubiis melior est conditio possidentis*)”. For the purpose of acquiring the fruits and for the procedural advantage of not having the burden of proof (*Passivlegitimation*) the doubting possessor can be considered as being in good faith and as having legitimate possession. In this respect, Mancio followed the teachings of Juan de Medina and rejected the view of Adrian, that in case of doubt it is not permissible to retain possession for any other purpose than finding out the truth. By the end of the sixteenth century many scholars no longer extensively discussed these consequences of doubt for legitimate possession, or at least not in relation to those for prescription, but the view that doubt and legitimate possession are not incompatible, seems to have become prevailing. The possessor is under the obligation to observe sufficient care, to find out the truth and possibly to hand over possession to the genuine owner. As long as there is still doubt, however, the present possession is protected. The Augustinian Pedro de Aragón (1539-1592) is one of the few who imposed a further obligation on the doubting possessor. In his commentary upon the *Secunda Secundae*, published in 1584, he maintained that the doubting possessor is safe in conscience when he shares his possession *pro rata* of his doubt with the

⁵¹ See for the meaning of the maxim according to probabilism: Schlüßler, R. “Zur Geschichte des Besitzindividualismus”, *Wirtschaftsethische Perspektiven VI* Korruption, Strafe und Vertrauen, Verteilungs- und Steuergerechtigkeit, Umweltethik, Ordnungsfragen [Schriften des Vereins für Sozialpolitik, Neue Folge; SVS 228/VI] (V. Arnold, ed), Berlin, 2002, pp. 321-336. Schlüßler, R., “On the atonomy of probabilism”, *Moral philosophy on the threshold of modernity* [The new synthese historical library, 57], (J. Kraye and R. Saarinen, eds), Dordrecht, 2005, pp. 91-113. Schlüßler, R., “Scholastic moral theology and moral self-ownership: some preliminary issues”, *Transformations in medieval and early-modern rights discourse* [The new synthese historical library, 59], (V. Mäkinen and P. Korkman, eds), Dordrecht, 2006, pp. 151-172.

⁵² Schmitt, A., *Zur Geschichte des Probabilismus. Historisch-kritische Untersuchung über die ersten 50 Jahre desselben*, Innsbruck, 1904, p. 5, referring to Concina’s *Storia del Probabilismo*.

one he thinks might be entitled. In case he has no idea who this might be, he should grant a share to the poor.⁵³

As regards prescription, Mancio sticks to the *regula magistralis* of tutorism. In his view even the exception, accepted by Adrian and his own master Soto, viz. that if the doubting possessor performs scrupulous investigations and is prepared to cede possession to the owner, he can acquire ownership through prescription, was a bridge too far. Surely, this stance was plausible (*probabilis*) but another position was more plausible (*probabilior*) and should be followed: also, after observing the required diligence, the doubting possessor will not acquire through prescription. The maxim “when in doubt, the position of the possessor is the better one” (*in dubiis melior est conditio possidentis*) cannot be applied to prescription. Doubt brings about that the *fides* is no longer *integra, sana* and *non vacillans* and accordingly that blocks prescription.

9. To conclude: “*dubium superveniens non nocet*” revisited

Mancio does not draw a distinction between doubt at the time possession was acquired and later emerging doubt. As we saw, such a distinction was relevant in the teachings of Bartolus (for the *forum externum*) and Prierias (for confession). By the end of the sixteenth century it was also adopted by moral theologians. The opinion that doubt affects good faith, as defended by Mancio, became the prevailing one for the situation that doubt was already present at the time possession was acquired. The opinion of Soto, defended in his commentary on the Sentences, that a doubting faith after having observed sufficient care is no obstacle for prescription to run, was apparently rejected. The Dominican Domingo Bañes (1528-1604) maintained in his *Decisiones de iustitia et iure* (1580) that prescription starts at the time the possessor observed sufficient care and was confident that no other was entitled. After observing such care, he had human faith (*fides humana*) which sufficed for prescription. Speculative doubt could still be present, in the sense that the possessor realized it was in theory still possible that his conviction would appear to be incorrect; but this speculative doubt does not affect good faith. A probable or plausible doubt (*dubium verisimile et probabile*) on the other hand, would prevent prescription from running.⁵⁴ Soto had taught that sufficient care did not necessarily have to expel such probable doubt, but according to the later prevailing view it should.

In general terms, Mancio considers it impossible to acquire ownership through prescription while being in doubt. Only few authors, such as Pedro de Aragon, followed this stance and did not draw a distinction between doubt at the beginning and supervening doubt. The possessor has the benefit of the doubt as regards the use of the possession (entitlement to fruits, protection by possessory remedies) not as regards prescription.⁵⁵ However, Domingo Bañes had already adopted the view of Prierias that doubt would not affect the prescription

⁵³ Petrus de Aragon, *In secundam secundae Divi Thomae Doctoris Angelici comentaria*, ed. Lyons 1597, p. 120 (Quaestio LXII, see ‘*ad fundamentum glossae*’, where Aragon challenges the opinion of Adrian). Later authors do expand the debate, amongst other things, to the problem whether the possessor who doubts out of ignorance can retain the possession (*dubium practicum*) or is in bad faith, if he does not abandon possession.

⁵⁴ Dominicus Bañes, *Decisiones de iustitia et iure*, ed. Venice 1595, Praeambulum ad Q. 62, p. 104-106.

⁵⁵ Aragon, p. 120: (...) tantum dici ad usum rei in dubiis esse meliorem conditionem possidentis, non autem ad praescriptionem.

when it already had started to run. This became the prevailing view among many Jesuits by the end of the sixteenth century. Moral theologians as Luis de Molina (1535-1600), Leonardus Lessius (1554-1623) and Juan de Lugo (1583-1660) opted for this, more lenient, approach of Prierias and not for the more rigoristic one of Mancio and Pedro de Aragon. They supported their opinion by referring to the maxim “when in doubt the position of the possessor is the better one” (*in dubio melior conditio possidentis*).⁵⁶ It is not always clear whether this maxim is understood here in the sense that the possessor should be protected in his possession of the object or in the sense that he should be protected in his ‘possession’ of the moral conviction he can retain the possession. All the same, it is well-known that many of these Jesuits adhered to probabilism. Mancio and Pedro de Aragon were, by contrast, rather inclined to the more tutoristic approach.⁵⁷

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⁵⁶ Ludovicus Molina, *De iustitia et iure*, Tomus I, ed. Genève 1733, p. 149 (Tractatus II, disp. 63, De secunda conditione, nempe de bona fide et an dubium malam fidem efficiat, n. 9); Leonardus Lessius, *De iustitia et iure*, ed. Lyons 1630, pp. 46-47 (Lib. 2, cap. 6, dubitatio III: Utrum dubitans an res sit sua, censeatur bona fide eam possidere); Ioannes de Lugo, *De iustitia et iure*, Tom. I, ed. Lyons 1642, p. 177 (Disp. VII, sectio III, n. 17). The sources show, by the way, that the divergence of opinion did not coincide exactly with the line between Dominicans and Jesuits. A Dominican scholar as Domingo Bañes acknowledged the rule that later emerging doubt does not cancel out prescription. Another Dominican, Silvestro Mazzolini da Prierio, was even its *auctor intellectualis*.

⁵⁷ I thank Wim Decock (Louvain) for his useful comment on the draft version of this paper and Frances M. Gilligan for correcting the English.

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